NOTES

THE RIGHTS OF STOCKHOLDERS PREFERRED AS TO CAPITAL TO SAFEGUARD THEIR INTERESTS IN A CORPORATION—Prof. W. Z. Ripley of Harvard in a recent article[1] observed: "At the threshold of intelligent corporate publicity stands a clear distinction between capital and income—the assurance that the property in being *used* is not being *used up*. For unless it be certain that the investment has been at all costs kept whole there can be no security that it is not being in part redistributed under the guise of profits. It is fundamental, in other words, that so-called profits should all of them have been really earned, instead of having been partially abstracted from the capital fund." One particular class of investors, though not necessarily the class of persons that Prof. Ripley had particularly in mind, especially requires protection as to his investment, viz., the stockholder, preferred as to capital.[2] The question of his right to have held intact for him sufficient assets of the corporation to redeem his stock at par, in the event of liquidation or a winding-up, is a pertinent one in the field of modern corporate finance.[3]

When the Delaware Chancellor in the recent case of *Wittenberg v. Federal Mining and Smelting Co.*[4] declared that "the complainants, as preferred stockholders possessing a prior claim on capital assets, have an equity which entitles them to protection against the proposed whittling away of those assets for the benefit of the less favored common stockholders," it would seem that he spoke only what is in consonance with fundamental rules of justice and right. This is not an *a priori* right of the preferred stockholder. The relation between a corporation and the holders of preferred stock therein is primarily a contract relation, and the rights and remedies of the

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[1] *The Shareholder's Right to Adequate Information,* ATLANTIC MONTHLY (Feb. 1926) 380.

[2] "Where a preference as to capital has been expressly contracted for, or is given by statute, the preferred stock is, of course, preferred as to assets also"; 1 COOK, CORPORATIONS (8th ed. 1923) 930. ". . . by statute or by their agreement with the corporation, they are given a preference, not only in the payment of dividends, but also in the distribution of capital, . . . ", 6 FLETCHER, CORPORATIONS (1920) 6039. 5 HALSBURY, THE LAWS OF ENGLAND (1910) 91. As to the words required to give a preference as to capital see *Re* Bagnor, etc. Slate Co. [1875], L. R. 20 Eq. 59; also Griffith v. Paget [1877], 6 Ch. D. 511.

[3] DEPT. OF COMMERCE, BIENNIAL CENSUS OF MANUFACTURES (1923) 14, where under "Summary for All Manufacturing Industries Combined, for the U. S.," the last reported total invested is $44,325,469,817. See also DEWING, THE FINANCIAL POLICY OF CORPORATIONS (1920) Vol. I, xiii: "The big businesses with their legions of stockholders, are big because of widespread ownership, and of the public concern which such business activity entails. It is this interaction between increasing size with its increasing number of stock and bondholders and an increasing public importance, which is one of the most significant elements in contemporaneous economic history."

[4] 133 Atl. 48 (Del. 1926). And see 75 U. OF PA. L. REV. 89 (1926).

holder of such stock depend upon the express and implied terms of his contract.[5] The corporation itself, being a creature of the legislature, derives its power to engage the stockholder in this contractual relation from statutes.[6] These usually give rather broad latitude as to the form which this contract of preference may take. If the terms of this contract are express and specific, there is no difficulty in determining just what the stockholder's preference is and what his rights are. But if, on the other hand, he is given merely a preference "as to capital," the question of his rights and what he may or may not do to safeguard them, is more or less unsettled. A review of the cases, both in this country[7] and England,[8] which touch upon the general question of capital impairment in its relation to the interests of stockholders, shows how uncertain are the foundations upon which to construct any rule for definitely determining the rights of the stockholder who by his contract has a preference as to capital.

Let us turn to the *Wittenberg* case[9] to discern therein if possible the enunciation of some principle which may serve as a guide. The defendant corporation was engaged in the mining and smelting business, and as such was known as a "wasting assets" corporation. Its outstanding stock consisted of 120,000 shares of preferred and 50,400 shares of common, all of the par value of $100, making a book capitalization of $17,040,000. The actual capital invested, however, at the time the action was started was $18,750,000. At the close of 1924 the balance sheet showed a capital deficit of over $7,000,000, which reduced the capital assets to below the $12,000,000 necessary to redeem the preferred stock at par. The company had never made any allowance for the continued depletion of the ore bodies which comprised most of its capital. The Delaware corporation law[10] required that dividends must be declared from surplus or net profits,

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[5] Spencer v. Smith, 201 Fed. 647, 652 (C. C. A. 8th, 1912); Lee v. Fisk, 222 Mass. 418, 420, 109 N. E. 833, 834 (1915); 6 FLETCHER, *op. cit. supra*, note 2, at 6026.

[6] *E. g.* DEL. REV. CODE (1915) c. 65, § 13: "Every corporation shall have power to create two or more classes of stock with such designations, preferences, and voting powers . . . as shall be stated . . . in the certificate of incorporation"; N. J. COMP. STAT. (1910) 1608; Act of 1921, P. L. 1159, PA. STAT. (Supp. 1924) § 5655a-1.

[7] *E. g.* Excelsior Water & Min. Co. v. Pierce, 90 Calif. 131, 27 Pac. 44 (1891); Van Vleet v. Evangeline Oil Co., 129 La. 406, 56 So. 410 (1911); Goodnow v. Am. Paper Co., 73 N. J. Eq. 692, 69 Atl. 1014 (1908); Mellon v. Miss. Wire Glass Co., 77 N. J. Eq. 498, 78 Atl. 710 (1910); People v. Roberts, 156 N. Y. 585, 51 N. E. 293 (1898); Booth v. Summit Coal Min. Co., 55 Wash. 167, 104 Pac. 207 (1909).

[8] *E. g.* Lee v. Neuchatel Co., 41 Ch. D. 1 (1889); Verner v. General Commercial Trust, [1894] 2 Ch. 239; Wilmer v. McNamara, [1895] 2 Ch. 245; Ammonia Soda Co. v. Chamberlain, [1918] 1 Ch. 266.

[9] *Supra* note 4.

[10] DEL. REV. CODE (1915) §§ 1948, 1949; 29 DEL. LAWS (1917) c. 113, § 7.

hence not out of capital.[11] The complainants, stockholders preferred as to capital and dividends, filed a bill for an injunction to restrain the payment of a dividend on the common stock, contending that the capital assets were depleted and that no provision had been made for capital replenishment, in order that the preferred stock might be paid off in the event of liquidation. The right of the preferred stockholders so to step in and protect their interests was acknowledged, and the injunction was granted, the court holding, in substance, that as long as the "capital assets" were impaired to an extent violative of the preference contract [12] there existed no surplus or net profits from which to declare a dividend.

Although the rule of this case applies in all strictness only to "wasting assets" corporations, *a fortiori,* from the standpoint of the proposition under discussion, any rule applicable to such corporations must apply with even more force to the ordinary corporation. To ascertain what such a preferred stockholder's rights are, some discussion of the term "capital" is necessary. While today in practically every state as well as in England there are statutes which make unlawful the payment of dividends out of "capital," and make the directors of the company responsible for any violation of that provision,[13] the cases show considerable confusion as to what is the capital from which dividends must not be paid, and in developing a definition of the term "capital," [14] this word is often used interchangeably with the term "capital stock." However, for the purposes of our discussion it is unnecessary to decide whether the "capital" which the statutes aim to protect against impairment is the amount originally realized through the sale of shares, or is the par value of those shares.

From a survey of the statutes [15] involved, as well as from numer-

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[11] As to "capital," "surplus," and "profits" in the sense here used see CLARKE, CORPORATIONS (3d ed. 1916) 422; 2 COOK, *op. cit. supra* note 2 at 1896; *Paying Dividends Out of Capital,* 44 CAN. L. JOUR. 94 (1908); *Payment of Dividends Out of Capital,* 62 SOL. JOUR. 66 (1917).

[12] *Supra* note 2.

[13] DEL. REV. CODE (1915) c. 65, § 1949; FLA. REV. GEN. STAT. (1920) Div. 4, Tit. 3, § 4119; MASS. GEN. LAWS (1921) c. 156, § 37, c. 158, § 44; N. J. COMP. STAT. (1910) 1617; N. Y. CAHILL'S CONS. LAWS (1923) c. 60, § 58; PA. STAT. (1920) §§ 5974, 5975; ENGLAND COMPANIES (CONSOLIDATED) ACT (1908), 8 Edw. 7, c. 69, § 110. The idea underlying these provisions was clearly expressed in an important dictum of the House of Lords in the case of Burnes v. Pennell, 2 H. L. Cas. 497, 525 (1849): "If no such profits have been made, and the dividend is to be paid out of the capital of the concern, a gross fraud has been practiced, and the directors are not only civilly liable . . . but are guilty of conspiracy."

[14] Mobile & O. R. R. v. Tenn., 153 U. S. 486, 496 (1893); Bishop v. Bishop, 81 Conn. 509, 528, 71 Atl. 583, 590 (1909); Mills v. Hendershot, 70 N. J. Eq. 258, 267, 62 Atl. 542, 547 (1905); Roberts v. Roberts-Wicks Co., 184 N. Y. 257, 267, 77 N. E. 13, 16 (1906).

[15] *Supra* note 13.

ous cases,[16] it is easy to gain the impression that rules against impairment of capital are primarily for the benefit of creditors. No little responsibility for the growth of such an idea can be traced to the well-known case of *Wood v. Dummer*,[17] wherein Mr. Justice Story said that the capital stock of the bank whose stockholders were being sued was a *trust fund* for its creditors. But the *trust fund* theory has been shown to be unsound.[18] In many states the statutes in cases of capital impairment, permit the creditor to interfere only when at the time of declaring the dividend the company was insolvent or when the declaring of such dividend caused insolvency;[19] in some states they permit the creditor to recover to the extent to which he has been injured by the declaring of the dividend out of capital.[20] But it is submitted that it is difficult for the creditor to prove that he has suffered injury as long as the corporation is a "going" concern, even though its capital may be impaired. Equity will help him if he can clearly show that his charge against the corporation is endangered and that his remedy at law is inadequate.[21] But it is often held that his claim must be first reduced to judgment,[22] although the right of the corporation to demand this may be waived.[23] Equity is very slow to sympathize with demands of creditors that are anticipatory of a wrong, or which call for preventive action, because the creditor always has his action and remedy at law when his claim becomes due. In fact there is strong support for the belief that, aside from the rights given him by statute, the creditor of a corporation should have no more safeguards thrown around him by the courts than those enjoyed by the creditors of individuals.[24]

And how now as to the stockholder, preferred as to capital? Is he in as secure a position as the creditor, as to his capital which is in the business? In many connections he cannot be considered a

[16] *E. g.* in Williams v. Boice, 38 N. J. Eq. 364, 370 (1884), it was said: "The capital of a corporation is a fund pledged for the payment of its debts. Each person who has given credit to it does so in the confidence that that fund exists for his protection and security against loss."

[17] 3 Mason 308 (U. S. 1824).

[18] In Hospes v. Northwestern Mfg. & Car Co., 48 Minn. 174, 192, 50 N. W. 1117, 1127 (1892), the court said: "Corporate property is not held in trust in any proper sense of the term." And Prof. Edward Warren of Harvard in 36 HARV. L. REV. 546 (1922): "The creditors are not the equitable owners of a fraction of the corporate assets equal to the amount of its capital stock."

[19] *Supra* note 13.

[20] 6 FLETCHER *op. cit. supra* note 2 at 6224.

[21] Sage v. Memphis etc. R. R., 125 U. S. 361 (1888); Mellen v. Moline Iron Wks., 131 U. S. 352 (1889). And see Altoona v. Richardson, 81 Kans. 717, 106 Pac. 1025 (1910).

[22] See Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371 (1893), and 10 COLUMBIA L. REV. 479 (1910).

[23] *Re* Metropolitan Ry. Receivership, 208 U. S. 90, 110 (1907).

[24] WARREN, *op. cit. supra* note 18 at 547.

"creditor." [25] However, in some respects, it seems that the stockholder, preferred as to capital, is deserving of just as many safeguards as the creditor, if not more. He has invested his capital on the promise of a conservative return. He often cannot control the policies of the corporation which may determine the fate of his investment. In fact very frequently he is deprived of a vote altogether. Sometimes this privilege is given to him only after several dividends have been passed, but even then its value to him is questionable, unless the other class of stockholders is deprived of its vote for a like period. Take the *Wittenberg* case.[26] At the time the preferred stockholders filed their bill there were several unpaid back cumulative dividends owing. Even these unpaid dividends are subject to the rule against paying dividends except out of profits. They are a lien only in a qualified sense, in case there is a surplus or profits fund available. But why should they not, for the purpose of safeguards, create a debtor-creditor relationship? Why should they not constitute a lien upon capital superior to any claims of deferred stockholders? It is at least arguable that a passed cumulative dividend owed to a stockholder, preferred as to capital, partakes in this respect of the nature of a debt quite as much as any obligation owed to a creditor, and that he is entitled to as great a measure of protection as creditors are.

Cases involving the protection of the preferred stockholder himself are, as has been intimated, few. However, that the rights of the stockholder, preferred as to capital, have been guarded, can be seen from the restrictions which have been placed upon the reduction of capital stock. Both in this country and in England such reduction can often take place only in conformity to legislative grant, either directly or through the charter or articles of the company,[27] and must be consistent with the contract rights of the stockholders. A leading English case [28] has held that the loss of such reduction must fall upon those who would have to bear it if there was a winding-up. In this case, when the capital assets became depleted, the court upheld

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[25] 1 COOK, *op. cit. supra* note 2 at 910; 6 FLETCHER, *op. cit. supra* note 2 at 6012: "They are stockholders in the corporation with all the rights and liabilities of stockholders and are not creditors of the corporation, unless made such by valid provisions in their contract, except in a limited and peculiar sense, in some degree assimilating that relation."

[26] *Supra* note 4.

[27] *Re* Welsbach Gas Light Co., [1904] 1 Ch. 87; Seignouret v. Home Ins. Co., 24 Fed. 332 (C. C. La. 1885); Md. Trust Co. v. National Bank, 102 Md. 608, 63 Atl. 70 (1905); 5 FLETCHER, *op. cit. supra* note 2 § 3471; 5 HALSBURY, *op. cit. supra* note 2 at 100.

[28] *In re* London and N. Y. Investment Corp., [1895] 2 Ch. Div. 860. And see *Re* Espuela Land and Cattle Co., [1909] 2 Ch. 187, and *Re* Fraser and Chalmers, [1919] 2 Ch. 114, in both of which, stockholders preferred as to capital were upon a winding-up paid not only the par value of their stock, but also shared ratably with the common shareholder in an additional surplus. And see 5 HALSBURY, *op. cit. supra* note 2 at 531.

the right of the directors to place the entire burden upon the founders' shares and the common shares, leaving the shares, preferred as to capital, fully protected and untouched. This was tantamount to a declaration that such preferred stockholders are entitled to have the capital fund preserved intact. And in another English case,[29] where there had been an admitted loss of almost half of the operating capital, with no hope of regaining the same, the capital fund, in so far as it related to such preferred stockholders, was mantained intact, even though it meant the total extinguishment of the two other classes of shares. In these cases [30] the protection accorded to the preferred stockholder extended no further than the preservation of the amount of his investment. It does not appear that he objected to the proposed reduction provided his investment was thus preserved. If he had objected to any reduction whatsoever on the ground that his investment was endangered by the cutting down of his margin of safety, measured by the amount that the original capital of the company exceeded his investment, he would perhaps have failed because he purchased his stock subject to the known and accepted risk of having this margin reduced in the statutory way. Whether in cases involving reductions of this margin in other ways he has a right to object will be considered later.

Various cases in which apparently an impairment of capital has been allowed, on analysis either do not bear out the proposition for which they are cited, or certainly cannot be taken as limiting the rights of the preferred stockholder. The *Lee v. Neuchatel Co.*[31] case has been often cited for the proposition that dividends can be paid without regard to the maintenance of the capital assets. The preferred stockholders in this case, however, were not preferred as to capital, and, furthermore, even had they been, they could not have prevented the payment of the dividend because the company's property, an asphalt concession, had actually appreciated in value, and all the assets were worth more than when it was incorporated.[32] And in the *Excelsior Water and Mining Co.* case,[33] the court in refusing to enjoin the payment of a preference dividend at the instance of a stockholder said with significance: ". . . there is nothing to show that the capital of plaintiff has been impaired." And it is interesting to note that in a recent English Court of Appeal case [34] the directors were not forced to pay back a dividend which they had declared because there had been an actual appreciation in the value of

[29] *In re* Floating Dock Co. of St. Thomas, [1895] 1 Ch. 691.

[30] *Supra* notes 28, 29.

[31] *Supra* note 8.

[32] It was on the ground that there was actually no impairment of capital that Justice Stirling rested his opinion in the lower court in Lee v. Neuchatel, *supra* note 8.

[33] *Supra* note 7.

[34] Ammonia Soda Co. v. Chamberlain, [1918] 1 Ch. 266.

the salt brine properties of the company, and the capital fund was therefore considered intact. In a New Jersey case[35] a preferred stockholder attempted to prevent the declaring of a dividend on the grounds that the capital stock would be depleted. The case hinged upon the interpretation of the term "capital stock." The court, upon deciding that the term meant capital *actually invested* rather than mere nominal share capital, refused to interfere, saying very plainly: "The value of the present assets exceeds the value of the actual assets with which the company began business."

Assuming now in the light of the foregoing, that the stockholder, preferred as to capital, has the right to hold the corporation strictly accountable for any impairment of "capital," what is the extent of that right? May he require that the total invested capital be unimpaired? Or does his right extend only to the amount of capital representative of the interest of such preferred stockholders, excluding the capital chargeable to the other classes of stockholders? Or is any one stockholder's right coextensive with *his own interest* only? These are questions not readily answered from a survey of the cases. The *Wittenberg* case on its actual facts, involved an interest only in the amount of capital which the preferred class of stockholders covered, although the prayer for an injunction asked that "defendant be enjoined from paying a dividend when such payment would impair *the invested capital"*; and the Chancellor in his opinion used the words "there being a deficiency of net assets below its *paid in or invested capital,"* and "[the preferred stockholders] possessing a prior claim on *capital assets* have an equity which entitles them to protection against the proposed whittling away of *those assets."*

From these words of the court, as well as from the underlying tendency of the opinions, in the other cases mentioned, toward respecting the integrity of the capital assets as a whole, it is submitted that the inference is justifiable that the safeguard afforded the stockholder, preferred as to capital, extends to the actual capital of the company, whatever the court decides that capital to be, whether it is merely the actual invested capital originally paid in for shares as capital, or is the par value of all outstanding shares. That is, his right to object to an impairment is not limited to an impairment of the amount of his investment, except perhaps only in the case of reductions in capital to which he has expressly or by implication agreed.[36]

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[35] Goodnow v. Am. Paper Co., *supra* note 7.

[36] *E. g., Re* London and N. Y. Investment Corp., *supra* note 28, and *Re* Floating Dock Co. of St. Thomas, *supra* note 29.

MORAL TURPITUDE AND ITS CONNECTION WITH THE INFRACTION OF LIQUOR LAWS—If an attorney has on his back porch a jug containing a small quantity of intoxicants, is he guilty of moral turpitude? The Supreme Court of Kansas (two judges dissenting) answered this question in the affirmative in a case decided last July.[1] The defendant was convicted under a "bone-dry" law of the state, which made the mere possession of liquors a misdemeanor, and the court held that the case came under a statute making mandatory the disbarment of an attorney who is convicted of a felony or of a misdemeanor involving moral turpitude, and so excluded the defendant from further practice. The opinion read in part:

> "The expressed sentiment of the people of the state and nation is that for reasons involving moral grounds the use of liquor must be curbed, and to that end various acts in relation to it have been forbidden because to permit them would tend to frustrate the general purpose of constitutional prohibition. In Kansas one of these forbidden acts is the possession of liquor. He who disobeys the statute in this regard to that extent refuses to abide by the legislative declaration of public policy and in some degree lends himself to its defeat." [2]

Two questions are presented by this decision: (1) what is meant by moral turpitude; and, (2) is this element present in the violation of liquor laws?

I

It is undoubtedly true that "moral turpitude" is more easily ascertained by an intuitive, rather than a definitive process. In one case it was said:

> "The term lacks precision, and necessitates the examination of the works of moral and ethical authors, rather than the textbooks of legal writers, to ascertain whether a given case falls within or without the rule." [3]

However this may be, the term is now employed in determining many forms of legal liability; it is evidently the touchstone of American courts in deciding what imputations of crime are actionable *per se* in cases of libel and slander;[4] it is used in regard to evidence ad-

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[1] State v. Bieber, 247 Pac. 875 (Kan. 1926).

[2] *Ibid.*, 876.

[3] *Ex parte* Mason, 29 Ore. 18, 43 Pac. 651 (1896). See also Skinner v. White, 1 Dev. & B. 471 (N. C. 1836), where the court criticizes the phrase as being too indefinite as a test for slander.

[4] Sipp v. Coleman, 179 Fed. 997 (C. C. N. J. 1910).

missible for attacking the credibility of witnesses;[5] it appears in statutes governing the exclusion and deportation of aliens,[6] the revocation of physicians' licenses,[7] and, as in the principal case, the disbarment of attorneys.[8] The courts, therefore, must inevitably have formulated certain principles to circumscribe the phrase.

Moral turpitude is ordinarily defined as "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow-men or to society in general, contrary to the accepted and customary rule of right and duty between man and man." [9] This, it will be seen, allows a great deal of latitude, but it does permit some deductions. In the first place, it would obviously exclude any unintentional wrong or any act made improper by statute without regard to the mental element involved.[10] It would follow from this that a violation of a bone-dry law, which makes the mere doing of an act punishable could not be called moral turpitude by any extension of the term unless knowledge was shown (a) of the possession of the liquor, and (b) of the existence of the statute; that is, a conscious violation of the law. Secondly, the term could not be applied to cases where the mental element is negligence, as this is rather an intellectual than a moral fault.[11]

Some courts have attempted to found the definition on the distinction between crimes *malum in se* and *malum prohibitum*.[12] This, however, is at best a rough test, and suffers from an excess of conservatism. On the one hand, not every act *malum in se* involves moral turpitude. An assault and battery is such a crime, yet a simple assault and battery without more has never been regarded as an act of depravity.[13] For example, imputation of such a crime is not actionable *per se* in slander.[14] On the other hand, to hold that the crimes traditionally punishable at common law run the whole moral

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[5] *Ex parte* Marshall, 207 Ala. 566, 93 So. 471 (1922), and cases cited *infra* note 22.

[6] In particular 39 STAT. 889 (1917), U. S. COMP. STAT. (1918), § 4289¼jj.

[7] Fort v. City of Brinkley, 87 Ark. 400, 112 S. W. 1084 (1908).

[8] Underwood v. Comm., 105 S. W. 151 (1907); *In re* Callicote, 57 Mont. 297, 187 Pac. 1019 (1920); State v. Edmunson, 103 Ore. 243, 204 Pac. 619 (1922). See also 63 U. OF PA. L. REV. 49 (1914), and 6 C. J. 585, note A.

[9] BOUVIER, LAW DICT., and cases cited, especially *In re* Henry, 15 Idaho 755, 99 Pac. 1054 (1909).

[10] Pullman Car Co. v. Central Trans. Co., 65 Fed. 158 (C. C. Pa. 1894).

[11] United States v. Flynn, U. S. Daily, Nov. 15, 1926 (D. C. N. D. Ohio, No. 14048). This case discussed the nature of the element of negligence in involuntary manslaughter.

[12] *Ex parte* Marshall, *supra* note 5; Fort v. City of Brinkley, *supra* note 7

[13] United States v. Smith, 8 F.(2d) 663 (W. D. N. Y. 1925).

[14] McCuen v. Ludlum, 17 N. J. L. 12 (1839); NEWELL, SLANDER AND LIBEL (4th ed. 1924) 79, giving a definition of the term.

gamut is to ignore the fact that fashions in morals change.[15] In a recent Federal case,[16] the court remarked:

> "Many things which were not considered criminal in the past have, with the advancement of civilization, been declared such by statute; and the commission of the offense, if it involves the violation of a rule of public policy and morals, is such an act as may involve moral turpitude."

Such a statement does not require us to go to the opposite extreme, and hold every prohibited act immoral. The court in the principal case quotes its own words from a previous decision[17] to the effect that "whatever is forbidden by the law must for the time being be considered as immoral." As was shown, however, at the start of this section, the words "moral turpitude" by hypothesis must involve a situation that is extra-legal, although the state of the law may be taken as an approximate index of the moral pulse. It is the doing of the act, and not its prohibition by statute, that determines the moral turpitude. Therefore reference must be had not only to the *purpose* for which the law was passed, but to the *circumstances* under which it was violated.[18] Furthermore, the same act will not carry with it the same degree of depravity in one part of the country as it will in another.[19] It is submitted, however, that more uniformity will be gained if the courts take as their criterion something more than the mere violation of a local statute.

II

With these considerations in mind, it is interesting to note to what extent moral turpitude has been attached to violation of liquor laws. Before the adoption of the Eighteenth Amendment, a great number of the liquor laws were for the purpose of revenue or control. So an imputation of a violation of such a law was not con-

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[15] Sipp v. Coleman, *supra* note 4: "Moral standards change with the ages . . . Conduct which in ancient or even mediæval times would be accepted as conventional, and therefore, in a legal sense, moral, would now be denounced as decidedly immoral. What in the old common law would be termed moderate correction of the wife by the husband is now execrated as wife-beating."

[16] Rudolph v. U. S., 6 F.(2d) 487 (Ct. of App., D. C. 1925), noted in 35 YALE L. J. 237 (1925), and annotated in 40 A. L. R. 1042.

[17] Crabb v. Board of Dental Examiners, 118 Kan. 513, 235 Pac. 829 (1925).

[18] Rudolph v. U. S., *supra* note 16, at 488.

[19] See the discussion in *Ex parte* Mason, *supra* note 3, and the statement of Lowrie, J., in Beck v. Stitzel, 21 Pa. 522 (1853): "This element of moral turpitude is necessarily adaptive; for it is itself defined by the state of public morals, and thus far fits the action to be at all times accommodated to the general sense of the community."

sidered actionable *per se*.[20] And a similar violation was not held sufficient to revoke the license of a physician under a statute allowing such revocation upon commission of a crime or misdemeanor involving moral turpitude.[21] Similarly, such evidence was held inadmissible to impeach the credibility of a witness.[22] In *Fort v. City of Brinkley*,[23] the court remarked:

> "It seems clearly deducible from the above-cited authorities that the words 'moral turpitude' had a positive and fixed meaning at common law, and that the illegal sale of intoxicating liquors, not being an offense punishable at common law, does not come within the definition of a crime involving moral turpitude. In a statement using a word, the meaning of which has a definite sense at common law, the word will be restricted to that sense."

Since prohibition has been grafted onto the Constitution, however, courts have more generally held that traffic in liquor shows an attitude in direct opposition to the expressed moral tone of the people. In a recent decision in the District of Columbia,[24] the court, in allowing the discontinuance of a policeman's pension under a statute similar to that in the principal case, said:

> "Selling liquor without a license, under the former method in which the liquor traffic was violated, is a very different offence from a violation of the *National Prohibition Act* . . . The traffic in intoxicating liquors has by fundamental law, been denounced as inherently wrong, a social evil, condemned by every standard of private and public morals."

This case is worthy of note as being decided on an offense punishable under the *National Prohibition Act*. The tenor of the principal case is along the same lines.

On the other hand, it may be suggested that both the *Rudolph* case and the *Bieber* case involved the conviction of public or semi-public officers—one a policeman, the other an attorney. Both of the courts dwell upon the sanctity of the oath administered to the defendants, and it is obvious that the offense in both cases is considered to be aggravated by their official character. In fact, the Kansas court says:

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[20] Morgan v. Kennedy, 62 Minn. 348, 64 N. W. 912 (1895). *Contra:* Smith v. Smith, 2 Sneed 473 (Tenn. 1855), where, however, it was the aggravated offense of selling spirituous liquors to a slave.

[21] Fort v. City of Brinkley, *supra* note 7.

[22] Jennings v. State, 82 Tex. Cr. App. 504, 200 S. W. 169 (1918), and cases cited in *Ex parte* Marshall, *supra* note 5. *Contra:* Fields v. U. S., 221 Fed. 242 (C. C. A. 4th, 1915), where the court held that illicit distilling was to cheat the government out of its revenue.

[23] *Supra* notes 7, 21.

[24] Rudolph v. U. S., *supra* note 16.

"In view of the fact that an attorney-at-law holds a position of a quasi public character . . . it is not unreasonable to exact a higher standard of private conduct from him than that expected from the rank and file of our citizenry." [25]

While the dissenting judge held that as the legislature made a distinction between crimes involving moral turpitude and those not of this type, that distinction should be strictly followed, because of the penal character of the statute, yet the majority decision is not at all an impossible interpretation of the legislative intent as to the special class. Furhermore, it bears out the former argument that the circumstances, rather than the precise crime, determine the moral turpitude.

But when there is a question of statutes involving no special class, as those on the impeachment of witnesses, we have no reason for such discrimination. Both the Alabama [26] and the Texas [27] courts still hold that evidence of such an offense is inadmissible to attack credibility. As, however, they base their decisions on the distinction between crimes *malum in se* and *malum prohibitum,* it is impossible to tell the effect of the *Prohibition Act* upon their attitude. Decisions have not been numerous on this point, and some, as has been shown, have been affected by the peculiar status of the parties. However, if the term is to mean anything, even under the Prohibition Amendment, it must mean more than a technical offense. As the dissenting judge remarks, he would have no difficulty with the case if the attorney were engaged in the manufacture or sale of liquor, but that it seemed a bit extreme to him to disbar this man "by the isolated fact of having had a bottle of liquor on his kitchen shelf."

J. A. M., Jr.

TERMINATION OF CRIMINAL RESPONSIBILITY BY ARREST IN CONSPIRACY TO COMMIT FELONY—It is axiomatic that when several persons, as the result of a conspiracy, undertake a felony, each is criminally responsible for all criminal acts of his associates committed during the perpetration of the felony and in furtherance of the common design.[1] As a ramification of this doctrine, the Supreme Court of Pennsylvania sustained a conviction of murder in the first degree upon the following facts.[2]

D with four others formed a conspiracy to rob a bank messenger, planning to escape in an automobile which they heavily stocked with arms and ammunition. After they had held up the messenger

[25] State v. Bieber, *supra* note 1, at 876.

[26] Lakey v. State, 206 Ala. 180, 89 So. 605 (1921); *Ex parte* Marshall, *supra* note 5.

[27] Carter v. State, 99 Tex. Cr. App. 40, 271 S. W. 629 (1925).

[1] Cases cited WHARTON, HOMICIDE (3d ed. 1907) 644, n. 1.

[2] Commonwealth v. Doris, Sup. Ct. Pennsylvania, decided Dec. 6, 1926.

and seized the loot, they were unable to start their automobile. They then abandoned both car and loot, and fled together on foot, keeping up a continuous fire against their pursuers. *D* tripped and fell and was forcibly arrested by citizens who had joined the chase. The others continued their flight. One of the other bandits some ten minutes later and a half mile away, killed an officer who was following. *D* was in the custody of the police and probably in a patrol wagon when the killing occurred.

The court held: First, that the continuous ensuing flight from the scene of the robbery without any break in the chain of events was part of the *res gestæ*, so that the homicide committed in the flight could be held to be committed in the perpetration of the felony; second, that the arrest did not terminate *D's* responsibility for the subsequent homicide committed by his companion.

It was necessary to decide that the homicide was a part of the felony, or the second question would not arise. If the court were to decide that the homicide during the flight was not part of the *res gestæ*, *D* could not be guilty. He is responsible only for the acts of his fellow conspirators in the commission of the designed felony, and if the felony is complete before flight, his responsibility ceases for the later acts of his associates. The great majority of courts hold that an immediate, continuous and uninterrupted flight is part of the felony.[3] Yet when the homicide occurs after the flight has reached another jurisdiction, and the pursuit is no longer fresh, probably every court would hold, as a matter of law, that the homicide was not part of the felony because of the intervening time and space. The strict rule in New York is that a felony is complete when the robber leaves the premises of the crime and abandons the loot.[4] But even the New York courts would probably hold responsibility when resistance to the death was part of the common design,[5] as it would seem to be in the present case. Pennsylvania is in accord with the majority of states in holding that such flight immediately ensuing, with no break in the chain of events, was part of the *res gestæ*.[6] Other states would reach the same conclusion, but would probably base it on the ground that the facts show a conspiracy to escape by the use of any force necessary, as well as a conspiracy to commit the felony.[7] It would seem, therefore, that almost any court would agree

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[3] Bissott v. State, 53 Ind. 408 (1876); Conrad v. State, 75 Ohio 52, 78 N. E. 957 (1906); Francis v. State, 104 Neb. 5, 175 N. W. 675 (1919) (homicide committed a mile from scene of felony).

[4] Dolan v. People, 64 N. Y. 485 (1876); People v. Giro, 197 N. Y. 152, 90 N. E. 432 (1910); People v. Marwig, 227 N. Y. 382, 125 N. E. 135 (1919).

[5] Ruloff v. People, 45 N. Y. 213 (1871).

[6] Accord: Commonwealth v. Lessner, 274 Pa. 108, 118 Atl. 24 (1922); Commonwealth v. Lawrence, 282 Pa. 128, 127 Atl. 465 (1925).

[7] State v. Klein, 97 Conn. 321, 116 Atl. 596 (1922); McMahon v. People, 189 Ill. 222, 59 N. E. 584 (1901); Commonwealth v. Brown, 90 Va. 671, 19 S. E. 447 (1894).

with the conclusion of this case that the homicide was a part of the felony.

It is submitted that *D* could have withdrawn from the common design, and could have relieved himself of any responsibility for the subsequent acts of the others. The dissenting judge in the lower court argued that the arrest took away the right of repentance which the law gives, and that *D* was therefore involuntarily withdrawn by the State, lifted out of the crime and freed from criminal responsibility for ensuing acts.[8] But the reasoning does not seem sound when one analyzes the elements of withdrawal and the theory on which the case was tried. To effect a withdrawal two elements must be present: (1) an intention to withdraw, and (2) the giving of notice of such intention to the associates in the crime in such time as to afford them a reasonable opportunity to follow the example and refrain from further action.[9] In other words, there must be an abandonment of the crime which is effectually communicated to the others in time for them to repent if they so wish.

Before going more deeply into the question of withdrawal, and with the general principles in mind, it is important to consider the ways in which a man may be convicted of murder in the present situation. There are three theories on which an indictment can be supported; as principal in the second degree, as conspirator in a felony, and as accessory before the fact.[10] If it is tried on the theory of *principal* in the second degree, the accused must be actually or constructively present, aiding or abetting the crime.[11] An arrest under this theory would lift him out of the crime because he could no longer be aiding or abetting. Further, in the present situation he was no longer actually or constructively present. But a *co-conspirator* is guilty of murder if the homicide grows directly out of the attempted execution of the felony whether he was present or not.[12] Ordinarily the question of presence is not involved, for in most cases the accused is present and could either be tried as a principal in the second degree or as a co-conspirator.

The theory on which the State in the principal case based its argument of *D's* liability for the homicide committed by the fellow conspirator is thus different from that of the principal in the second degree. Each conspirator impliedly consents to the use of such force by his associates as may be necessary to the successful accomplishment

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[8] 8 Pa. D. & C. R. 210 (1926).

[9] State v. Klein, *supra* note 7; People v. Chapman, 224 N. Y. 463, 121 N. E. 381 (1918); People v. Ortiz, 63 Cal. App. 662, 219 Pac. 1024 (1923).

[10] Discussion of an indictment under the theory of accessory before the fact is omitted.

[11] State v. Tally, 102 Ala. 25, 15 So. 722 (1893); Krueger v. State, 171 Wis. 566, 177 N. W. 917 (1920).

[12] Spies v. People, 122 Ill. 1, 17 N. E. 898 (1887); State v. Penny, 113 Iowa 691, 84 N. W. 509 (1900); Roesel v. State, 62 N. J. L. 216, 41 Atl. 408 (1898).

of their common design, and if a homicide is the natural and probable result, each is equally responsible.[13] The law regards the act of forming a conspiracy to commit a felony as setting a force in motion the natural results of which create liability. The entering into the conspiracy is like setting off the fuse of a bomb under a building. It is under this theory that the discussion of whether arrest terminates responsibility for a later homicide committed by a fellow conspirator applies.

Can he who, with others, has set off the fuse of the bomb say to his associates when it is too late to put out the fuse, "I am wrong in doing this and want to withdraw"? A leading New York decision holds that he cannot.[14] There *A* and *B* agreed to rob *X's* shop. *A* stood at the door while *B* attempted to rob *X*, who resisted. While *B* and *X* were struggling, *A* called out to *B* to give up the job and leave. *A* then left, and *B* soon after in the struggle shot *X*. *A*, on being tried, pleaded that he had withdrawn from the felony. The court said *inter alia*, "Fear or actual repentance must lead to an actual effective retirement before the act in question has become so imminent that its avoidance is out of the question." The court in the principal case adopted and applied this principle. So it held, an effective withdrawal would have been impossible because *D* with the others had begun the flight with continuous volleys of bullets fired at their pursuers, and a death was the imminent and probable result of that flight. Nor was the arrest of *D* a good example to the others, which, in the case of repentance and withdrawal, is one reason why further criminal responsibility ceases.[15] Then how can an arrest take away his right of withdrawal which has already gone when he joined the others in a murderous resistance and flight? All the present case decides on this new question is that in such circumstances responsibility does not terminate.

But the further problem arises as to whether an arrest before the flight would have lifted the accused out of the crime because it was an involuntary withdrawal which took away his right to withdraw. It would seem that if the accused were tried under the same theory of joint responsibility in a conspiracy to commit a felony and the flight was held to be part of the felony, the arrest would not exonerate him. By actively participating in the conspiracy he has set a force in motion which carries responsibility with it until he acts to take himself out of it. He cannot dissociate himself from liability, unless he voluntarily and effectively detaches himself from the crime so that there is an interval of time or a break in the chain of events between the detachment and the act from which he wishes to

[13] Williams v. State, 81 Ala. 1, 1 So. 179 (1886); Lamb v. People, 96 Ill. 73 (1883); Commonwealth v. Micusco, 273 Pa. 474, 117 Atl. 211 (1922).

[14] People v. Nichols, 230 N. Y. 221, 129 N. E. 883 (1921). Accord: State v. Klein, *supra* note 7; People v. Chapman, *supra* note 9.

[15] People v. Nichols, *supra* note 14 at 229.

escape responsibility, and so that the others thus have a chance to follow his good example. It would not free him from responsibility to have escaped before the homicide occurred,[16] nor would it be a defense that he had been knocked unconscious and thus was prevented from communicating his withdrawal to the others. Why then should he be allowed the defense, when he is arrested, that it has lifted him out of the crime because it prevented the possibility of withdrawal? Certainly an arrest *vi et armis* does not indicate a determination to repent, nor does it set a good example to the others, but to the contrary spurs them on to more violent resistance. Further, the law, when it grants the privilege of repentance and withdrawal, does not grant the second privilege that a man will not be convicted unless he had the conditions under which he could exercise the privilege of repentance. So he who enters a conspiracy takes the chance that the conditions necessary to the exercise of the privilege of repentance may be absent.

The instant case is authority only for the principle that a forcible arrest does not terminate liability for a subsequent homicide committed during the perpetration of the felony, when tried under the theory of joint responsibility in a conspiracy to commit a felony, if the homicide was so imminent that a voluntary withdrawal would have been impossible. There seem to be no previous decisions on this question in any state. However, the principal case cannot be extended as authority beyond the facts from which it arose, nor be applied to cases tried on any other theory. It does not decide whether such arrest relieves from responsibility, when tried under the same theory, if a voluntary withdrawal would have been possible had it not been for the arrest. But it is submitted that under the reasoning of this decision it would not, and that it should not terminate the responsibility of the one arrested.

L. M. C. S.

PRICE MAINTENANCE PRACTICES AS "UNFAIR METHODS OF COMPETITION" UNDER THE FEDERAL TRADE COMMISSION ACT—The question, how far, under section 5 of the *Federal Trade Commission Act*,[1] the Commission may curtail a method of maintaining uniform resale prices, has been further complicated by the recent case of *Ayer v. Federal Trade Commission*,[2] in which an order of the Commission was reversed. The petitioner, by mild means, attempted to induce wholesalers and retailers to resell its products at suggested prices. One of its practices was, when it had been informed by one customer

[16] Moody v. State, 6 Coldwell 299 (Tenn. 1869).

[1] 38 STAT. 719 (1914), U. S. COMP. STAT. (1918) § 883e.

[2] 15 F.(2d) 274 (C. C. A. 2d, 1926). For a general discussion of the question see *Price Maintenance Practices as "Unfair Methods of Competition" Under the Federal Trade Commission Act*, 75 U. OF PA. L. REV. 248 (1927).

of a "violation" by another, to send the "offender" a form letter which declared that it would not "knowingly permit any customer to lower" its products "in the esteem of the buying public by cutting prices." The letter added the petitioner's belief "that you will hereafter cooperate with us in this connection." At the same time a form letter of thanks was forwarded to the complaining customer which requested, "if you find that they continue to do so [cut prices] in the future, please notify us." Other practices were found by the Commission which ordered the petitioner to desist from entering into price agreements with its customers, and to desist from requesting and acting upon their reports. Although orders condemning the practice of requesting reports from customers have been six times upheld,[3] and in no instance vacated, the court in the principal case reversed the order. Many grounds are indicated in the opinion. It was said that the petitioner had a legal right to state under what conditions it would deal with another so long as it did not attempt to fix the other's resale prices;[4] it was held that where, as here, the instances of unfair practices are few in relation to the volume of the business, the Commission should not act;[5] it was declared that the present order "has no support in the evidence."[6] But the ground which appears to have controlled the decision is that, in view of this court, reasonable price-maintenance not tending toward monopoly, and brought about by means morally and ethically fair, is not of itself an unfair method of competition but a right of the manufacturer—if anything is unfair it is "demoralizing" price-cutting. In the court's own words:

> "Oppression and monopoly are the objectionable elements to which the law takes exception. . . . This court has recognized the right to protect the manufacturer's interest and to enable the jobbers to make reasonable profits and to refuse to sell to jobbers who sell to the retailers at a greater discount than the wholesalers have approved. *American Tobacco Co. v. F. T. C.*"[7] "As long as the manufacturer does not monopolize his line of prod-

[3] F. T. C. v. Beech-Nut Packing Co., 257 U. S. 441 (1922), Oppenheim, Obendorf & Co. v. F. T. C., 5 F.(2d) 574 (C. C. A. 4th, 1925); Hill Bros. v. F. T. C., 9 F.(2d) 481 (C. C. A. 9th, 1926); Moir *et al.* v. F. T. C., 12 F.(2d) 22 (C. C. A. 1st, 1926); Q. R. S. Music Co. v. F. T. C., 12 F.(2d) 730 (C. C. A. 7th, 1926); Cream of Wheat Co. v. F. T. C., 14 F.(2d) 40 (C. C. A. 8th, 1926).

[4] This is the test which was first set out in United States v. Colgate & Co., 250 U. S. 300 (1919), and which has since frequently perplexed the courts.

[5] The court offers no authority for this. It merely declares that no court has ever held occasional instances to amount to unfair methods. But when, if the findings of the Commission are conclusive, may a court review the number of instances supporting a finding?

[6] It is submitted that this ground is untenable since, as this very opinion expressly states elsewhere, the findings of the Commission are conclusive. *Cf.* American Tobacco Co. v. F. T. C., 9 F.(2d) 570 (C. C. A. 2d, 1925).

[7] *Supra* note 6.

ucts and use unfair or fraudulent methods, he should be permitted to exercise the privilege which the law accords him of selecting his customers, and refusing to sell to customers who undermine the market by becoming price-cutters. He should not be hampered in conducting his legitimate business. Section 5 of the act does not give the Federal Trade Commission power to thus regulate trade policy. It is only where the practices amount to fraud in regard to some public or private right. It is then that an unfair method in competition is established. The right to fix prices, or regulate prices, is not within the province of the respondent [the Commission]."

Other courts have limited themselves to singling out as unfair methods particular practices. This court is the only one which has squarely faced the real problem: Is price-maintenance itself an unfair method of competition? Inconsistent as the other decisions are with one another, the decision in the principal case seems irreconcilable with them taken as a whole. But it is to be commended highly as a challenge to the courts to face the true issue.

E. S. W.